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USA Capital First Trust Deed Fund, LLC*

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:) BK-S-06-10725-LBR
USA COMMERCIAL MORTGAGE COMPANY) Chapter 11
Debtor)

In re:) BK-S-06-10726-LBR
USA CAPITAL REALTY ADVISORS, LLC,) Chapter 11
Debtor)

In re:) BK-S-06-10727-LBR
USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,) Chapter 11
Debtor)

In re:) BK-S-06-10728-LBR
USA CAPITAL FIRST TRUST DEED FUND, LLC,) Chapter 11
Debtor.)

In re:) BK-S-06-10729-LBR
USA SECURITIES, LLC,) Chapter 11
Debtor.)

Affects)
☐ All Debtors) Date: September 28, 2006
☐ USA Commercial Mortgage Co.) Time: 9:30 a.m.
☐ USA Securities, LLC)
☐ USA Capital Realty Advisors, LLC)
☐ USA Capital Diversified Trust Deed)
☒ USA First Trust Deed Fund, LLC)

**JOINT OMNIBUS REPLY TO OBJECTIONS TO THE: (1) FIRST INTERIM
APPLICATION OF STUTMAN, TREISTER & GLATT P.C. AS COUNSEL FOR THE
OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA CAPITAL**

FIRST TRUST DEED FUND, LLC FOR ALLOWANCE AND PAYMENT OF FEES AND EXPENSES FOR THE PERIOD FROM MAY 10, 2006 THROUGH JULY 31, 2006; (2) FIRST INTERIM FEE AND EXPENSE APPLICATION OF SHEA & CARLYON, LTD., SPECIAL (LOCAL) COUNSEL TO THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA CAPITAL FIRST TRUST DEED FUND, LLC; (3) FIRST INTERIM APPLICATION OF ALVAREZ & MARSAL, LLC AS FINANCIAL AND REAL ESTATE ADVISOR FOR THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA CAPITAL FIRST TRUST DEED FUND, LLC FOR ALLOWANCE AND PAYMENT OF FEES AND EXPENSES FOR THE PERIOD FROM JUNE 1, 2006 THROUGH JULY 31, 2006; AND (4) FIRST INTERIM APPLICATION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA CAPITAL FIRST TRUST DEED FUND, LLC FOR REIMBURSEMENT OF EXPENSES OF COMMITTEE MEMBERS FOR THE PERIOD FROM MAY 10, 2006 THROUGH JULY 31, 2006 (AFFECTS USA CAPITAL FIRST TRUST DEED FUND, LLC)

Stutman, Treister & Glatt P.C., counsel for the Official Committee of Equity Security Holders of USA Capital First Trust Deed Fund, LLC (the "FTDF Committee") appointed in the above-captioned bankruptcy cases (the "Chapter 11 Cases"), and Shea & Carlyon, special (Nevada) counsel for the FTDF Committee, jointly reply to the following pleadings: (1) Response of The Richard and Sheila J. McKnight 2000 Family Trust and Richard McKnight SEP-IRA to First Interim Fee and Expenses Application of Shea & Carlyon, Ltd., Special (Local) Counsel to the Official Committee of Equity Security Holders Of USA Capital First Trust Deed Fund, LLC (docket #1294); (2) Omnibus Response of JV Direct Lenders to First Interim Fee and Expense Applications (docket #1316); (3) the Richard and Sheila J. McKnight 2000 Family Trust and Richard McKnight Sep-Ira's Joinder to Omnibus Response of JV Direct Lenders to First Interim Fee and Expense Applications (docket #1317); (4) Objection of Joseph Milanowski and Thomas Hantges to the Applications for Compensation and Reimbursement Of Expenses; and (4) The Richard and Sheila J. McKnight 2000 Family Trust and Richard McKnight SEP-IRA's Joinder to Objection of Joseph Milanowski and

1 Thomas Hantges to the Applications for Compensation and Reimbursement of Expenses
2 (docket #1330) (the "Reply").¹

3 This Reply is made and based on the pleadings, papers and records on file in the
4 Chapter 11 Cases, and any evidence and oral argument to be presented at the time of the
5 hearing of Motion.
6

7 DATED this 25TH day of September, 2006.

8 SHEA & CARLYON, LTD.

9 

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23

24 ¹ This Reply is also intended as a response to the several "Letters" that have been filed, including: (1) the Ventura
25 Letter (docket #1314); (2) the Jessup Letter of Concern (docket #1332); and (3) the Jessup Letter of Declaration
26 (docket #1333).
27
28

1 **POINTS AND AUTHORITIES**

2 **I.**

3 **BACKGROUND**

4 On August 25, 2006, Shea & Carlyon ("SC") filed its First Interim Fee and Expense
5 Application of Shea & Carlyon, Ltd., Special (Local) Counsel to the Official Committee of
6 Equity Security Holders of USA Capital First Trust Deed Fund, LLC (the "SC Fee
7 Application").

8 The compensation requested in the SC Fee Application was a total of \$171,222.75 for
9 the period of May 10, 2006 through July 31, 2006 (the "Application Period"), including
10 \$166,122.75 in fees, and \$6,100 in expenses.

11 The caption of the SC Fee Application indicated that SC's request for interim
12 compensation was one affecting solely the debtor entity USA Capital First Trust Deed Fund,
13 LLC (the "FTDF").

14 On August 31, 2006, Stutman, Treister & Glatt, P.C. ("STG") filed its First Interim
15 Application of Stutman, Treister & Glatt P.C. as Counsel for the Official Committee of Equity
16 Security Holders of USA Capital First Trust Deed Fund, LLC for Allowance and Payment of
17 Fees and Expenses for the Period from May 10, 2006 Through July 31, 2006 (the "STG Fee
18 Application").

19 The compensation requested in the STG Fee Application was a total of \$595,675.01
20 for the Application Period, including \$563,338.50 in fees, and \$32,336.51 in expenses.

21 As with the SC Fee Application, the STG Fee Application clearly indicated in its
22 caption that its request for interim compensation was one that would affect solely the FTDF
23 debtor.

1 On August 31, 2006, Alvarez and Marsal, LLC ("AM"), filed its First Interim
2 Application of Alvarez & Marsal, LLC as Financial and Real Estate Advisor for the Official
3 Committee of Equity Security Holders of USA Capital First Trust Deed Fund, LLC for
4 Allowance and Payment of Fees and Expenses for the Period from June 1, 2006 Through July
5 31, 2006 (the "AM Fee Application").
6

7 The compensation requested in the AM Fee Application was a total of \$168,370.62,
8 including \$166,030.93 in fees, and \$2,339.69 in expenses.

9 As with the SC and the STG Fee Applications, the AM Fee Application clearly
10 indicated in its caption that its request for interim compensation was one that would affect
11 solely the FTDF debtor.
12

13 On August 31, 2006, the FTDF Committee (and collectively, with SC, STG, and AM,
14 the "Applicants") filed its First Interim Application of the Official Committee of Equity
15 Security Holders of USA Capital First Trust Deed Fund, LLC for Reimbursement of Expenses
16 of Committee Members for the Period from May 10, 2006 Through July 31, 2006 (the
17 "Committee Expense Application", and collectively, with the SC, STG, and AM Fee
18 Applications, the "Applications").
19

20 These (and other) Applications engendered several objections, including from: (1) The
21 Richard and Sheila J. McKnight 2000 Family Trust and Richard McKnight SEP-IRA (the
22 "McKnight Objection"); (2) the JV Direct Lenders (the "JV Direct Lenders Objection"); and
23 (3) Joseph Milanowski and Thomas Hantges (the "Milanowski/Hantges Objection," and
24 collectively, the "Objections"), as well as joinders by The Richard and Sheila J. McKnight
25 2000 Family Trust and Richard McKnight SEP-IRA in both the JV Direct Lender Objection
26 as well as the Milanowski/Hantges Objection (the "McKnight Joinders").
27
28

1 The thrust of all of the Objections are essentially the same. Both the JV Direct
2 Lenders Objection and the McKnight Objection request that none of the fees or expenses
3 requested be paid from any of the loans in which those parties hold a beneficial interest, and
4 the Milanowski/Hantges Objection requests that none of the fees of expenses be paid from the
5 USA Commercial Mortgage Company ("USACMC") Collection Trust Account. The
6 Milanowski/Hantges Objection additionally argue that there is insufficient time to review the
7 Fee Applications.
8

9 In responding to these Objections, SC, STG, AM, and the FTDF Committee address
10 solely the arguments described above, and do not in any way waive their right to separately
11 address objections made that are based upon other grounds, or that are made by other parties.
12

13 II.

14 LEGAL AUTHORITY

15 Section 503(b)(2) of the Bankruptcy Code provides that, "after notice and a hearing,
16 there shall be allowed administrative expenses...including compensation and reimbursement
17 awarded under section 330(a) of this title." Section 331 of the Bankruptcy Code provides
18 that:
19

20 A trustee...or any professional person employed under section
21 327 or 1103 of this tile may apply to the court not more than
22 once every 120 days...or more often in the court permits, for
23 such compensation for services rendered before the date of such
24 an application or reimbursement of expenses incurred before
such date as is provided under section 330 of this title. After
notice and a hearing, the court may allow and disburse to such
applicant such compensation or reimbursement.

25 "The limited purpose of this statute is to provide financial relief to court-appointed
26 officers engaged in protracted bankruptcy litigation, so that these officers do not have to wait
27
28

for what may be years before receiving compensation.” In re Strand, 375 F.3d 854, 858 (9th Cir. 2004). Moreover, such compensation is entitled to priority as an administrative expense under 11 U.S.C. §§ 503(b) and 507(a)(1). See also Industry Network System, Inc. v. Armstrong World Industries, Inc., 54 F.3d 150, 153 (3d Cir. 1995) (“Section 503(b) of the Code allows reasonable compensation for an attorney as an administrative expense of the estate and § 507(a)(1) gives the expense priority.”)

A. The Applications Seek Compensation Solely from the FTDF Estate as an Administrative Expense.

As all of the Applications have made clear, the Applications seek that the interim compensation requested therein be allowed and paid as an administrative cost solely from the FTDF debtor’s estate. None of the Applications have suggested that the administrative costs of the FTDF estate be paid either from the loans in which the JV Direct Lenders or McKnight hold a beneficial interest or from the monies held in the USACMC Collection Trust Account. Nor have the Applications taken any position as to whether or not those assets constitute property of any particular estate from which expenses of administration can be paid.

In fact, it is the understanding of SC, STG, AM, and the FTDF Committee that the compensation that they have requested in their respective Applications will be paid from the distributions that this Court has authorized be made to the FTDF debtor’s estate. Accordingly, these parties request that their Applications be granted.

B. The Notice Provided by the Applicants Pursuant to the Bankruptcy Code and the Court’s Order Provides Parties-in-Interest with Adequate Time to Review the Applications.

The Milanowski/Hantges Objection makes the additional argument that the Court should hold back an undefined portion of the compensation request in the Applications “until final fee applications are improved,” due to “insufficient time to fully analyze the Fee

1 Applications.” The Milanowski/Hantges Objection cites as its sole authority the case of In re
2 Smith, 317 F.3d 918 (9th Cir. 2002.) However, that case merely sets forth the standards for
3 reviewing an application for compensation; it says nothing regarding either the inadequacy of
4 the 20-day notice provision for fee applications provided by Federal Rule of Bankruptcy
5 2002(a)(6),² nor is there mention in that case of any reluctance or “holdback” associated with
6 awarding interim fee applications.
7

8 In fact the statute expressly authorizes the Court, after notice and a hearing, to “allow
9 and disburse to such applicant *such compensation or reimbursement*” as is requested in the
10 interim fee application. 11 U.S.C. § 331 (emphasis added). In addition, as noted in Strand,
11 awarding interim compensation serves the policy of not forcing court-appointed professionals
12 to wait extended periods of time for their justly earned compensation.
13

14 Moreover, the Applications have been filed pursuant to an Administrative Order
15 Establishing Procedures for Interim Compensation and Reimbursement of Expenses of
16 Professionals entered by this Court on August 29, 2006 (docket #1199). That order expressly
17 sets forth the procedures for the interim payment of professional compensation, including:
18 (1) filing interim fee applications every four months; (2) filing monthly statements to be paid
19 without the requirement of obtaining Court approval, but *from which 20% is to be held back*;
20 and (3) a comprehensive system of review of the applications for compensation by parties-in-
21 interest.
22

23 Similar procedures were approved in In re Mariner Post-Acute Network, Inc., 257 B.R.
24
25

26 ² In fact, the STG, AM, and FTDF Committee Applications were filed on August 31, 2006, providing parties-in-
27 interest with *28 days* notice; and the SC Application was filed on August 25, 2006, providing parties-in-interest
28 with more than *30 days* notice – all well in excess of the 20-day notice required by the Bankruptcy Code.

1 723 (Bankr. D. Del. 2000). In that case, the court held that the Chapter 11 debtors' proposed
2 procedures for professionals' interim compensation and reimbursement of expenses satisfied
3 the Bankruptcy Code's requirements for the making of interim payments to professionals
4 without prior court approval. The court noted that the cases were large, and that waiting an
5 extended period for payment would place an undue hardship on the professionals in light of
6 the large amount of fees incurred in the case. The court recognized that the proposed fee
7 procedure was subject to notice and a hearing prior to its approval, and that under the
8 procedures, the debtors could make monthly conditional interim payments of 80% of
9 requested professional fees without prior court approval, subject to later review and
10 disgorgement.
11
12

13 Thus, procedures have already been established by this Court that address the concerns
14 raised in the Milanowski/Hantges Objection. To the extent that the Milanowski/Hantges
15 Objection seeks a reconsideration of the Court's order in this case, it is both procedurally
16 defective and without merit.
17

18 III.

19 CONCLUSION

20 For the reasons stated above, Shea & Carlyon, Ltd., Stutman, Treister & Glatt, P.C.,
21 Alvarez & Marsal, LLC, and the FTDF Committee respectfully request that the Court grant
22

23 ///

24 ///

25 ///

26 ///

1 their respective Applications.

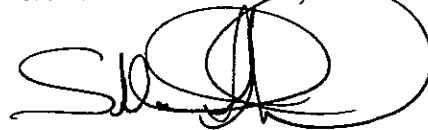
2 DATED this 25th day of September, 2006.

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SHEA & CARLYON, LTD.

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